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No. 74-1316

In the Supreme Court of the United States

OCTOBER TERM, 1974

TURNER ELKHORN MINING COMPANY, ET AL.,
APPELLANTS

v.

JOHN T. DUNLOP, SECRETARY OF LABOR, AND CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellees hereby move to affirm paragraph 3 of the judgment of the district court.

STATEMENT

The appellant coal mine operators (hereafter plaintiffs) have appealed from the portion of the judgment of the district court that sustained the constitutionality of most of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, 30 U.S.C. (Supp. II) 901 *et seq.* In a cross-appeal, No. 74-1302, we have appealed from the district court's holding that two provisions of Title IV are unconstitutional.

We rely in this motion to affirm upon our jurisdictional statement in No. 74-1302 and our motion to affirm in

National Independent Coal Operator's Association v. *Brennan*, 419 U.S. 955, affirming 372 F. Supp. 16 (D.D.C.).[1]

ARGUMENT

The questions presented in the jurisdictional statement are functionally identical to those presented in *National Independent Coal Operator's, supra*. In that case the district court upheld Title IV against similar contentions, also made by a group of mine operators. The jurisdictional statement in that case asserted, as does plaintiffs' jurisdictional statement here, that Title IV retroactively burdened transactions considered "closed" by the mine operators, arbitrarily compelled mine operators to compensate miners who may have been employed only a brief period, and established an assertedly "irrational and arbitrary" series of definitions and evidentiary presumptions. See *National Independent Coal Operator's* J.S., pp. 7-15. This Court summarily affirmed, thereby rejecting those contentions. The summary affirmance in *National Independent Coal Operator's* is dispositive of this case.

1. Plaintiffs contend that Part C of Title IV is unconstitutional because some ex-miners, who have not worked in the mines after the effective date of the Act, are entitled to receive compensation from their former employers. We addressed an identical contention at pages 9-12 of our motion to affirm in *National Independent Coal Operator's*, and we rely upon those arguments here. We argued that, under traditional concepts of tort law, an injury caused by events in the past does not "occur" until the disability becomes manifest. An injurer does not

[1]Plaintiffs have been furnished with copies of our motion to affirm in *National Independent Coal Operator's*.

escape liability merely because the consequences of the injury are delayed or concealed. Part C imposes liability only for injuries discovered or occurring after the date of its passage; liability for injury or death occurring earlier is borne by public funds. Part C therefore does not operate retrospectively, and is a permissible exercise of legislative power.

Plaintiffs contend (J.S. 16-21) that Part C is innovative and not as fair as other forms of compensation that might have been enacted. They apparently recognize, however, that such complaints ordinarily do not establish a flaw of constitutional magnitude, for they also assert that this legislation "should be subjected to a scrutiny more careful than that demanded in the case of constitutional challenges to [other] laws affecting economic interests * * *" (J.S. 14). There is no reason, however, for this Court to subject Part C to extraordinary scrutiny. As *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156, recently reaffirmed, the Constitution does not authorize this Court to evaluate the wisdom of economic and social welfare legislation. The legislative choice must be upheld if "there is an evil at hand for correction, and * * * it might be thought that the particular legislative measure was a rational way to correct it" (*Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488). See also *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421. So long as the statute is rational and creates no invidious discrimination, those adversely affected by it must seek relief from the legislature, not from the courts.

The approach taken by Congress in Part C meets these standards. It requires mine operators to recompense their employees, past and present, for occupational diseases caused by working conditions in their mines and becoming manifest after the effective date of the Act.

It was reasonable for Congress to conclude that the coal industry should bear part of the responsibility for redressing injuries arising out of employment in the mines. And it was equally reasonable for Congress, through the use of a workers' compensation plan, to place that responsibility upon operators in proportion to the extent of the injuries occurring in their mines. Although Congress might have imposed liability without regard to responsibility,[2] it is not irrational or unfair to impose liability relating more directly to the effects of work in the particular operator's mines. Under Part C liability is imposed upon an operator only if "a prior employment nexus is established" and "the claim is based on pneumoconiosis arising, at least in part, from such employment" (J.S. App. B, p. 5b). The district court therefore correctly concluded that the statute "manifest[s] a logical and rational basis for the assertion of liability" (*ibid.*). The Constitution requires no more.

2. Plaintiffs also contend (J.S. 21-24) that some of the evidentiary presumptions in Part C, and some of its definitions, are arbitrary, and that they should have been permitted to introduce in the district court evidence that

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[2]Plaintiffs concede (J.S. 16) that Congress constitutionally could create a program of compensation to miners for disability caused by employment long since terminated and finance that program by levying a tax on current mine operators. If such a program is permissible, it would amount to compelling all present operators to pay for injuries caused long ago, the very "flaw" that plaintiffs assail in Part C. We see no constitutional difference between financing compensation by a present tax on operators and financing compensation by a present workers' compensation program. The costs of either program would be approximately the same and fall on approximately the same operators. Indeed, it could be contended that a tax is less fair, because it compels recent entrants into the industry to make recompense for injuries caused by their predecessors; recent entrants would effectively subsidize firms that have been producing coal (and pneumoconiosis) for a longer period.

would demonstrate their asserted irrationality. As we pointed out in our motion to affirm in *National Independent Coal Operator's*, however, Congress had before it abundant evidence in support of the course it eventually chose. Plaintiffs in effect are seeking an opportunity to convince the district court that Congress should have chosen another, wiser course. But that is not an appropriate inquiry for the district court.[3] The evidence adduced before Congress provides the requisite support for the statute's rationality, and this Court so recognized in its summary affirmance in *National Independent Coal Operator's*.[4]

CONCLUSION

For the foregoing reasons paragraph 3 of the judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[3]Plaintiffs rely upon cases such as *Leary* v. *United States*, 395 U.S. 6, to support their argument that the district court must entertain evidence directed to the rationality of Congress' choices (see J.S. 22-23). But *Leary* was a criminal case, and in order to support a verdict of guilt a presumption must be accurate in fact as well as rationally supportable. See *Barnes* v. *United States*, 412 U.S. 837; *Turner* v. *United States*, 396 U.S. 398. The legislature is permitted a much freer hand in drawing inferences and establishing classifications in economic regulatory legislation.

[4]Plaintiffs challenge Section 411(c)(1) of the Act, 30 U.S.C. (Supp. II) 921(c)(1), which was not directly addressed by the jurisdictional statement and the motion to affirm in *National Independent Coal Operator's*. The considerations governing the rationality of that subsection are identical to those relevant to other portions of Part C, however, and the district court properly concluded that "the medical testimony received by the Congress" (J.S. App. B, p. 9b) amply supports Congress' choice.